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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC. and JACK O. GROSS, Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC. PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ALICE CABLE TELEVISION CORPORATION and BUCKEYE CABLEVISION, INC.

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AMICI CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (A. 184-193)* is reported at 378 F.2d 118. The Federal Communications Commission's Memorandum Opinion and Order (A. 146-179) is reported at 4 FCC 2d 612.

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*"A" refers to the printed appendix filed in this Court under Rule 36(1).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1967 (A. 194). A petition for a writ of certiorari was filed by the United States on July 13, 1967 (Case No. 363) and by Midwest Television *et al.* (Case No. 428) on July 27, 1967. Certiorari was granted in both cases on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1964) and 28 U.S.C. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the impact on local broadcast television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to Petitioner FCC's Brief pp. 57-61.

INTEREST OF AMICI CURIAE

Alice Cable Television Corporation (hereinafter "Alice Cable") operates a community antenna television (CATV) system[1] in the City of Alice, Texas, pursuant to a franchise

[1] A community antenna television system consists of a master television receiving antenna ("head-end" location), usually erected on a mountain, hill or other high elevation to receive the signals of the de-

issued by the City of Alice. Operations of the CATV system were commenced on August 24, 1963, and the system delivers to its subscribers the signals of television stations KIII, KRIS-TV and KZTV, Corpus Christi, Texas, and KENS-TV, KONO-TV and WOAI-TV, San Antonio, Texas, all of which are obtained off-the-air by Alice Cable by means of a tall antenna structure.

Buckeye Cablevision, Inc. (hereinafter "Buckeye") owns and operates a CATV system in Toledo, Ohio, pursuant to a franchise issued by the City. Buckeye delivers to its subscribers the signals of television stations WTOL-TV, WSPD-TV, WDHO-TV and WGTE-TV, Toldeo; WBGU-TV, Bolling Green, Ohio; WTVS, WWJ-TV, WKBD-TV, WXYZ-TV and WJBK-TV, Detroit, Michigan; and CKLW-TV, Windsor-Detroit, all of which are obtained off-the-air by Buckeye by means of an antenna structure.

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sired television broadcast stations in the necessary strength for good quality pictures, together with a coaxial cable distribution system leading from the "head-end" antenna throughout the community to the homes of individual subscribers, who are usually obliged to pay an initial connection fee and fixed monthly charge for the service. Initially, CATV systems were established generally in areas where, because of terrain and other topographic or geographic conditions, receiption of television signals by means of the ordinary home roof-top receiving antenna was non-existent or of unsatisfactory quality. However, recently CATV systems have been installed in areas where one or more local television stations are located. The function of the CATV system in the latter case is to improve the quality of existing television signals by eliminating interference, "ghosting" and the like, and to furnish a number of additional television signals and program choices from more distant stations, not available by means of roof-top antenna pickup. Today, approximately 1765 CATV systems serve approximately 3,000,000 households and 9,900,000 persons constituting approximately 5.3 percent of the total estimated United States households with television receivers.

Neither Alice Cable nor Buckeye utilize any radio relay microwave facilities in connection with the operation of their respective CATV systems. All television signals delivered to subscribers of Alice Cable and Buckeye (Amici) are obtained off-the-air, and no portion of the radio frequency spectrum is utilized in connection with the operation of their CATV systems.

On March 17, 1966, the Federal Communications Commission (Commission) asserted jurisdiction over the CATV industry by publishing in the Federal Register Rules and Regulations applying to all CATV systems, including Amici's. The Commission's rule making action was entitled the Second Report and Order in Dockets 14895, 15233 and 15971. (A. 1) The basis for the Commission's asserted authority was stated to be essentially found in Sections 2(a), 3(a), 4 (i), 303(f) and (r) and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 154 (i), 303(f), 303(r) and 307(b) (1964). The new Rules require all CATV systems, upon request, to carry the signals of all "local" television stations (those stations of Grade B strength or better) without material degradation in quality; and to refrain from duplicating any programs broadcast by such stations at any time during the same day of their broadcast by any such stations where one station's signal is of a higher priority than any other station's signal. The Rules also require Amici to comply with certain procedures concerning the addition of any new television signals to their CATV systems; require the filing of certain information; provide for procedures designed to obstruct and impede Amici's expansion of their systems' operations; and impose other limitations upon Amici and other similar CATV systems which do not use the radio frequency spectrum.

Amici hereby adopt the Statements of the Case set forth in the Briefs of Respondents, Mission Cable TV, Inc., Pacific Video Cable Co., Trans-Video Corp., and Southwestern

Cable Co., in Case Nos. 363 and 428, and therefore do not repeat herein in detail the history of the Commission's CATV regulation. In summary, however, the history of the Commission's circuitous and contradictory actions in asserting jurisdiction over CATV systems involves disclaimers by the Commission of jurisdiction over CATV systems,[2] repeated failures by the Commission to obtain Congressional action conferring jurisdiction upon it,[3] and finally adoption of the CATV Rules in the Second Report and Order without regard for traditional and required procedures.

The Commission's action in adopting the Second Report and Order has therefore adversely affected and aggrieved Amici as it did Respondents and all other owners and operators of CATV systems. Amici perfected appeals to the respective United States Court of Appeals in the Circuits in which Amici reside and have their principal places of business, challenging the jurisdiction of the Commission to issue its CATV Rules. Subsequently, Alice Cable's appeal to the Fifth Circuit Court of Appeals and Buckeye's appeal to the Sxith Circuit Court of Appeals were transferred pursuant to 28

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[2] *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite Stations", and TV "Repeaters" on the Orderly Development of Television Broadcasting,* Report and Order, Docket No. 12443, 24 Fed. Reg. 3004, 26 FCC 403, 18 Pike & Fischer, R.R. 1573, at 1599, 1600 and 1603 (1959).

[3] See *e.g.*, S. 2653, 86th Cong., 1st Sess. (1959), and a related report, S. Rep. No. 923, 86th Cong., 1st Sess. (1959). This Bill was defeated in the Senate. See 106 Cong. Rec. 9674 (1960). Subsequent attempts by the Commission to obtain jurisdictional legislation were unsuccessful in 1961 and as late as 1966, the Bills dying in Committee. See S. 1044, H.R. 6840, 87th Cong., 1st Sess. (1961), and H.R. 13286, 89th Cong., 2d Sess. (1966) and the accompanying Report H.Rep. No. 1635, 89th Cong., 2d Sess. (1966). See also, Appendix A of the Brief of Respondent, Southwestern Cable, "Legislative History of Attempts to Obtain CATV Legislation".

U.S.C. § 2112(a) to the United States Court of Appeals for the Eighth Circuit, Case No(s). 18793 and 18813, respectively, and now await decision by that Court.

Amici recognize that a question is presented for decision by this Court regarding the Commission's basic jurisdiction over non-microwave CATV systems. Amici further concede that the question presents problems of far-reaching importance. But, as parties to the several cases now pending in the Eighth Circuit, Alice Cable and Buckeye, must respectfully submit that the decision of the Ninth Circuit is not the proper vehicle for presenting those questions to this Court, since the grounds of that Court's decision are too narrow to present for decision herein all of the pertinent questions of law.

In addition to Amici, there are three other cases pending before the Eighth Circuit challenging the Commission's jurisdiction over CATV. Both national trade associations, the National Community Television Association, Inc., and the National Association of Broadcasters, are Intervenors in that Court. The significant constitutional questions involved in the Commission jurisdictional attempt, including the First and Fifth Amendments, were not considered or ruled upon by the Court below, but were fully briefed and argued by Amici and the other parties before the Eighth Circuit. Additionally, all of the specific CATV regulations and the asserted deficiencies therein, including serious violations of the Administrative Procedure Act, were extensively briefed and argued before the Eighth Circuit. These questions are not before this Court. We agree that this Court should ultimately decide the question of the Commission's jurisdiction over CATV. But, Amici respectfully submit that a meaningful decision must encompass the many subsidiary questions involved, including the Commission's manner and method of implementing the asserted jurisdiction. For these reasons, Amici respectfully suggest that the Court affirm the lower Court's narrow holding on the lack of authority to issue the interim order involved herein.

Recognizing the possibility of the Court's reaching the much broader question of jurisdiction, Amici sought and obtained the consent of counsel for the parties to these cases to submit this Brief *Amicus Curiae* on the question of the Commission's jurisdiction.

Continued enforcement of the CATV Rules constitutes, in our view, an illegal and unjustified extention of governmental power over a legitimate industry providing a necessary and sought-after service to the public. However, our concern extends beyond the interests of the particular parties to this litigation and beyond our own interest in conducting our businesses free from enervating Federal regulation. We believe the principle that Federal administrative agencies established by Congressional enactment as authorities with limited jurisdiction is impaired if any agency may, by its own administrative fiat, extend its powers without Congressional sanction to the limit of Congress' own power to regulate in a particular field; and that such disregard for this principle sets a dangerous precedent detrimental to the proper balancing and effective functioning of the vast powers of the Federal government contrary to the public interest.

SUMMARY OF ARGUMENT

I

The Federal Communications Commission Lacks Jurisdiction To Regulate Non-Microwave CATV Systems

A. The Federal Communications Commission was established by Congress by the enactment of the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.* As with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction. *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Regents v. Carroll*, 338 U.S. 586 (1950); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875

(D.C. Cir. 1962); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). This jurisdiction may not be broadened or extended by administrative fiat without specific Congressional authorization to the limits of Congress' own power to regulate in a particular field. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944).

B. The legislative history and the plain language and structure of the Communications Act of 1934 negate the Commission's assertion of jurisdiction over non-microwave, non federally licensed CATV systems. Communications Act of 1934, 48 Stat. 1064, *et seq.*, 47 U.S.C. § 151 *et seq.*; *Regents v. Carroll*, 338 U.S. 586 (1950); *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954).

C. The implied or general powers of federal administrative agencies to regulate areas of aligned activities which affect the regulatory scheme of an agency repose no power in an agency to expand its jurisdiction to wholly distinct and heretofore unregulated enterprises. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

D. The decision in *Buckeye* is in error and should not be followed by the Court. *Regents v. Carroll*, 338 U.S. 586 (1950); *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954).

II

The Commission Lacks the Statutory Power To Issue an Interim Order Maintaining the Status Quo Pending a Hearing To Determine the Impact on Local Broadcast Television of Distribution by a CATV System of Television Signals from Other Areas of the Country.

Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316 (1961); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962).

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE NON-MICROWAVE CATV SYSTEMS

A. The Federal Communications Commission was established by Congress by the enactment of the Communications Act of 1934, and as with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction.

The Federal Communications Commission was established by the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.*, to regulate communications in the United States "in the public interest, convenience and necessity." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). As with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction, which must be measured by and derives solely from the statute which grants and limits its powers. The Commission is powerless to confer jurisdiction on itself. *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Regents v. Carroll*, 338 U.S. 586 (1950); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

This Court has so stated in *Addison v. Holly Hill Fruit Products* as follows:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.
>
> * * *

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory *legislation. But it is no warrant for extending a statute that experience may disclose . . . should have been made more comprehensive.*" (322 U.S. 607, 616-617 (1944).) (Emphasis supplied.)

It is within the above framework that this Court must consider the validity of the Commission's action asserting jurisdiction over the CATV industry. This case calls for a determination of whether within the four corners of the Communications Act can be found the jurisdiction over CATV which the Commission asserts. Absent such a finding, the Commission may not extend its jurisdiction by its own administrative fiat to the limits of Congress' power to regulate in the field of communications.

B. The legislative history and the plain language and structure of the Communications Act of 1934 negate the Commission's assertion of jurisdiction over non-microwave, non-licensee CATV systems.

The Commission finds its jurisdiction over CATV systems in Title III of the Communications Act, arguing essentially (a) CATV systems are engaged in interstate "communication by wire" under Section 3(a), 47 U.S.C. § 153(a); (b) that Section 2, 47 U.S.C. § 152 makes the Act applicable to "all interstate communications by wire or radio . . . and to all persons engaged within the United States in such communication. . . ."; (c) that therefore, the Commission may utilize its Rule Making powers under Sections 4(i), 47 U.S.C. § 154(i); 303(f) and (r), 47 U.S.C. §§ 303(f) and 303(r) to regulate CATV so that it will not frustrate the purposes of Sections 303(h), 47 U.S.C. § 303(h) and 307(b), 47 U.S.C. § 307(b). The Commission's reasoning constitutes an intellectual bootstrapping attempt to reach a distorted extension of its own authority contrary to the Act's basic structure and is completely at odds with the clear purpose of the Congressional mandate as set forth in the legislative history.

The legislative history of the Communications Act clearly establishes that its primary purpose was to provide for the regulation of interstate radio and wire common carriers (Title II) and for the licensing of radio stations (Title III) by the same agency. Previously these two separate and distinct functions had been under the jurisdiction of the Interstate Commerce Commission (insofar as communications related to common carrier activities by telegraph, telephone and cable companies) and the Federal Radio Commission (which dealt with the licensing of radio stations). Both the Senate and House Reports with respect to the Act make it clear that no major substantive changes were made in either the Interstate Commerce Act, as amended, 80 Stat. 168, 49 U.S.C. § 1 *et seq.* (1966) or the Federal Radio Act, 44 Stat. 1162, 47 U.S.C. § 281, *et seq.* (1927).[4] Thus, the Commission has two distinct functions only: authority under Title II of the Act over common carriers engaged in interstate and foreign communications by wire or radio, *e.g.*, telephone and telegraph carriers; and jurisdiction under Title III of the Act over the field of "radio broadcasting" and relating to the radio *transmission* function. The two functions do not overlap. Wire communications cannot be controlled under Title III, and non-common carrier radio transmissions cannot be regulated under Title II. Thus, a resolution of the present jurisdictional conflict requires an analysis of the scope of each Title standing alone.

The Commission has consistently held that CATV systems are *not* common carriers within the meaning of Title II of the Act, and the Commission's ruling in this regard has been approved on appeal. *Philadelphia Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282 (D.C. Cir. 1966). Further, the Commission has held that CATV sys-

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[4] Thus, Title II "follows provisions of the Interstate Commerce Act, now applicable to communications . . ." (S. Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934)), and Title III ". . . consists of the Radio Act of 1927 written to bring into a single title effective provisions of that Act . . .".

tems are not broadcasters nor engaged in radio broadcasting. *Second Report and Order* (A. 8); *CATV and Repeater Services*, 26 FCC 403, 428-430, 18 Pike & Fischer R.R. 1573, 1600-1602 (1959).

Notwithstanding the latter holdings, the Commission has based its assertion of jurisdiction over CATV under certain broad provisions of Title III of the Act. Title III deals with "radio" *broadcasting* and "radio" *transmission*. This is the purpose of Title III (as it was the purpose of the Radio Act of 1927) – "It is the purpose of this Act . . . to maintain the control of the United States over all channels of interstate and foreign radio *transmission* . . ." 47 U.S.C. § 301. But CATV systems are not engaged in radio communications or radio transmission of energy. With respect to CATV systems which obtain television broadcast signals solely by means of off-the-air reception, the CATV system in no way is involved with the use of radio frequencies or with any possible radio interference. CATV systems are *reception* services, *not* transmission services.

With respect to its regulation under Title III of the Act, the method of regulation chosen by the Congress was by means of the *licensing* function. This Court specifically noted this restriction in *Regents v. Carroll*, 338 U.S. 586, (1950), as follows:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress . . . these cases . . . make clear that *the Commission's regulatory powers center around the grant of licenses*. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99. (Emphasis added.) *See also Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *National Broadcasting Company v. United States*, 319 U.S. 190 (1943).

This limitation on the Commission's authority was also recognized by this Court in *Federal Communications Com-*

mission v. American Broadcasting Co., 347 U.S. 284 (1954). This case dealt with the network "give-away" programs of a few years ago, and the relationship between the Commission's action with respect thereto and the general sanctions of the United States Criminal Code against broadcasting lottery information, 18 U.S.C. § 1304:

> "Like the Court below, we have no doubt that the Commission concurrently with the Department of Justice, has power to enforce Section 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions. *But the Commission's power in this respect is limited by the scope of the statute.* Unless the 'give away' programs involved here are illegal under Section 1304, the Commission cannot employ the statute to make them so by agency action." 347 U.S. at 289-90 (Emphasis added).

See also *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (concurring opinion).

Notwithstanding this limitation on its authority, the Memorandum Opinion of Law embodied in the *Second Report and Order* (A. 69) attempts to justify the Commission's assertion of jurisdiction over CATV systems because of what it terms the broad statements of purpose, application and definition contained in Title I of the Act (Sections 1, 2 and 3; 47 U.S.C. §§ 151, 152 and 153); and the general Rule Making authority granted to it by Sections 4(i) and 303(f) and (r), 47 U.S.C. §§ 154(i) and 303(f) and (r) which, in turn, says the Commission ". . . includes authority to take action necessary, not inconsistent with the Act or law to prevent frsutration of Section 307(b) by CATV - and 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and 3(a)". *Second Report and Order* (A. 71). The Commission also premises jurisdiction on its conclusion that CATV systems have a "uniquely close

relationship to the regulatory [broadcast] scheme embodied in Sections 303(h) and 307(b)" (A. 72).

However, the Commission's vague reasoning simply will not sustain jurisdiction as to CATV activities which are plainly not within the scope of Congress' specific statutory language. When the Act itself is examined, it is discovered that not only is language lacking to give the Commission jurisdiction, but the language of the statute expressly denies such jurisdiction. The simple reading of the Sections cited by the Commission as confirming jurisdiction discloses this to be the fact.

The invocation of the Rule Making provisions of Section 4(i) and 303(f) and (r), 47 U.S.C. §§ 154(i) and 303(f) and (r) is misplaced, since these sections confer no independent substantive power, but relate only to other substantive provisions of the Act.[5] There is no question but that the Commission has been given the authority by Congress to adopt Rules and Regulations and to take such actions as are "not inconsistent with the Act or law". However, as *Regents v. Carroll* indicates, the Rule Making provisions have meaning only as they are related to the Commission's authority to license. "Congress has enabled the Commission to regulate . . . through a licensing power. It is in connection with this power that Section 303(r) is to be interpreted." *Regents v. Carroll, supra* at 600.

Sections 303(f) and 303(h) of the Act are to be interpreted likewise. Section 303(f) merely allows the Commission to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations. . . ." Section 303(h) gives the Commission "authority to establish areas or zones to be served by any station." Both Sections again have nothing at all to do with

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[5]For the legislative history of 47 U.S.C. § 154(i) see Appendix B of the Brief of Respondent Southwestern Cable Co.; and for legislative history of Section 303(r) see Appendix C of the Brief of Respondent Southwestern Cable Co.

CATV. CATV systems *do not* cause interference nor do they have anything to do with zones or areas in which radio broadcasting stations are located.[6] An examination of all of the provisions of Section 303 in *context* clearly indicates the relation of that entire Section to the *broadcast licensing* function. For example, Section 303(a) of 47 U.S.C. deals with the classification of *radio* stations; 303(c) with *frequency* bands; 303(e) with the "purity and sharpness of the emissions from each station"; 303(i) with chain broadcasting; 303(k) with radio stations on "railroad rolling stock"; all of which are related to the transmission function and as noted in *Regents v. Carroll, supra,* to the method chosen by Congress to implement regulation, *i.e.*, licensing. CATV systems do not require Commission licenses, nor have Amici sought license authorization from the Commission.

The purpose and definitions Sections of the Act cited by The Commission provide no basis for its jurisdictional attempt. Section 1 of the Act, 47 U.S.C. § 151, states that:

> "the purpose of the Act is to regulate interstate and foreign commerce and communications by wire and radio so as to make available, as far as possible, to all of the people of the United States, a rapid, efficient, Nationwide, and worldwide wire and radio communication service . . . for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies. . . ."

The purpose of the Federal Communications Commission and the Communications Act is thus stated in general terms which, however, do not define or confer any specific jurisdiction.

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[6] The Commission's authority under 47 U.S.C. § 303(h) relating to broadcast zones and areas is concerned mainly with radio interference and allows regulations dealing with transmitting powers and classes of operating stations; the purpose again being to avoid the chaos and confusion arising from the essentially unregulated radio system of the early days of broadcasting.

Section 2 of the Act, 47 U.S.C. § 152, states that the provisions of the Act "shall apply to all interstate and foreign communications by wire or radio. . . ." Rather than conferring jurisdiction on the Commission over all such communications, this Section rather merely describes in general terms the scope of the Act and the outside limits of its application. This reading is emphasized by the second sub-division of Section 2, which indicated that the Act shall not be construed to give the Commission jurisdiction with respect to *intrastate* communications service by wire or radio.

Section 3 of the Act is merely the definitions section thereof which again confers no jurisdiction. As Commissioner Loevinger pointed out in his opinion concurring in part and dissenting in part in the *Notice of Proposed Rule Making in Docket Nos. 14895, 15233 and 15971*, 4 Pike & Fischer R.R. 2d at 1719 (1965), a number of terms are defined in Section 3 of the Act, 47 U.S.C. § 153, including the terms "United States", "person" and "State Commission", it being obvious that the Commission does not have jurisdiction over these parties or persons.

Perhaps the most significant basis of the Commission's asserted jurisdiction over CATV systems is its contention that such regulation is necessary to avoid frustration of the provisions of Section 307(b) of the Act, 47 U.S.C. § 307(b). However, like the other sections of the Act relied upon by the Commission and heretofore discussed, Section 307(b) also is specifically limited to the licensing and regulation of *radio* stations. Amici's CATV systems and all other "off-the-air" CATV systems, however, do not rely on radio frequencies to supply CATV service to their subscribers; and, as the Commission concedes, have no need for an FCC license.

The positioning of Section 307(b) with arguments relating to the establishment of new broad national communications policies is misplaced. Section 307(b) merely requires the Commission in considering its *licensing* function to make "such distribution of licenses, frequencies, hours of opera-

tion, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service" to each of the same. The legislative history of the Communications Act of 1934 makes it clear that this provision was intended only to avoid the serious frequency congestion and interference which had been caused by the proliferation of essentially unregulated radio stations during the early radio period. Since the frequency spectrum is limited, the Commission is required to be equitable in its allocation of the radio band so that some of the states and communities will not be left out or "short changed".

This basis for 307(b) stems in part from the situation in the early days of radio when the Secretary of Commerce had no control over the *location* of radio stations. Not unsurprisingly, large numbers of such stations were located in or near major metropolitan centers such as Chicago and New York. Section 307(b) is intended solely to insure efficiency and preciseness in the frequency allocations function. As in the case of the other sections of the Act heretofore analyzed, the plain words of the statute are quite clear – it is transmission and *not* reception that is involved.

What is actually involved in the Commission's attempt to seize jurisdiction over CATV is the first control over the *reception* of radio and television signals, a claim of jurisdiction never before made by the Commission. The Commission has now told the American viewing public what television signals they may receive, during what hours, and in what geographic areas. This is a far cry from telling potential users of the scarce radio spectrum, what frequencies, if any, they may transmit on and under what conditions such transmission will be permissible. No judicial authority supports a re-interpretation of the Communications Act which gives the Commission power to control the *reception* of radio signals, as distinct from their *transmission*.

The Commission has specifically disclaimed such jurisdiction on a number of previous occasions. *Cable Vision Inc.*

v. *KUTV, Inc.*, 211 F. Supp. 47, 55 (1962), *rev'd on other grounds*, 355 F.2d 348 (9th Cir. 1964); and, recognizing its clear lack of same, has requested Congressional action, as early as 1959, S.2653, 86th Cong., 1st Sess. (1959); S. Rep. No. 923, 86th Cong., 1st Sess. (1959) in which the Senate bill was labeled as an act "to establish jurisdiction" in the Commission, and as late as 1966, to obtain such authority, H.R. 13286, 89th Cong. 2d Sess. (1966); H. Rep. No. 1635, 89th Cong., 2d Sess. (1966). The Communications Act has not changed since the Commission's several prior interpretations thereof concerning CATV, nor has Congress recognized the need for such legislation. The Commission is thus left where it was eight years ago, *i.e.*, finding no jurisdiction within the four corners of the single statutory basis of its own authority over the Communications transmission system of the United States.

The inconsistency of the Commission's present position and the over-reaching nature of its CATV jurisdictional attempt is perhaps best illustrated by its conduct in 1962 in connection with the All-Channel Receiver Law, which Act is relied upon now, in a clear afterthought, as a major policy basis for its jurisdiction. In 1962, the Commission sought and received Congressional legislation designed to allow the Commission to require UHF reception capability for all commercial television receivers. 47 U.S.C. §§ 303(s), 330 (1962), H. Rep. No. 1559, 87th Cong. 2d Sess. (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. (1962).

There would appear to be no clear or significant distinction between such limitation on the use of individual *receiving* sets and the present attempted foreclosure or limitation on the use of various CATV receiving apparatus, the former of which the Commission felt in 1962 required an amendment to the Act since its "present authority" was "not commensurate with its responsibilities." *Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 8 (1962). However, in the space of four short years, the Commission indicates that it needs

no Congressional legislation to accomplish the latter purpose. If the Commission's argument that any instrumentality which is incidental to or used in the process of transmitting picture or sound which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction is valid, then the All-Channel Law was completely unnecessary, since television and radio receiving sets are just as much within the jurisdictional concept as CATV systems and broadcasting stations. Neither the Commission nor the Congress has ever acted on this premise, but, on the contrary, both have proceeded on the completely opposite assumption.

Commissioner Loevinger well pointed out the logical extension of this "interstate chain of communications" theory:

> "If this jurisdictional foundation is sound for CATVs the Commission may, by precisely the same technique, impose its regulations on theatres or newspapers, on stockbrokers or taxicabs, indeed on any business or person that needs and uses the service of a communications common carrier." *Notice of Proposed Rule Making in Docket Nos.* 14895, 15233, 15971, 4 Pike & Fischer R.R. 2d at 1718 (1965).[7]

See also the following Congressional minority views on the latest Commission attempt to obtain jurisdiction from the Congress:

> "If the Congress passes H.R. 13286, it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied

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[7]The Commission almost annually requests the Congress to confer upon it the statutory jurisdiction to regulate the televison networks, arguing that such jurisdiction is essential in the public interest. But under the Commission's theory of CATV jurisdiction, it already clearly has control over network practices, since there is no clearer example of an "essential link" in an interstate chain of communications. Yet the Commission does not assert authority over these practices without Congressional approval.

the Federal Communications Commission under the Communications Act of 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from Satellite transmittals as well as local broadcasting stations and network broadcasts. Freedom requires that the full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its Rule-Making powers." See H. Rep. No. 1635, 89th Cong., 2d Sess. (1966) Minority Report at 24-25.

C. The Implied or General Powers of Federal Administrative Agencies To Regulate Areas of Aligned Activities Which Affect the Regulatory Scheme of an Agency Repose No Power in an Agency To Expand Its Jurisdiction to Wholly Distinct and Heretofore Unregulated Enterprises.

Those cases which have recognized a certain and limited implied agency authority to deal with activities which might affect the regulatory system entrusted to the agency do not help the Commission expand its statutory mandate to include jurisdiction over CATV Systems. *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953), and *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), involved much more limited and closely aligned situations than are involved in the case of CATV. In these cases, this Court held that the regulatory agency having jurisdiction over a particular field of activity and an *enterprise within that field* could act with reference to a particular *practice by that enterprise* not specifically described in the agency's basic enabling statute. *Practices* not conceived of at the time of passage of the basic act, and subsequently conducted by clearly jurisdictional companies, have been held to be within the regulatory agencies' purview. However, the hold-

ings of these cases are not germane to the question of jurisdiction of the agency over an entirely distinct industry. Though the Interstate Commerce Commission can preclude a certain *practice* by a clearly jurisdictional trucking company, not specifically set forth in the Act, it does not follow that the Commission may inherently regulate all uses to which the trucker's goods are ultimately put by its customer.

Rather than the policy position relied upon by the Commission as expressed in the *American Trucking* case, it is the policy set forth in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) and similar cases which govern the situation here. There, this Court struck down the Federal Power Commission's attempt to subject undeveloped leaseholds to its jurisdiction, even though the party's basic operation was concededly within the agency's general jurisdiction. This Court's language in *Panhandle* is particularly relevant here.

> "Nothing in the sections indicates that the power given to the Commission over natural-gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the Constitutional limit of congressional authority over Commerce.
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> * * *
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> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history, we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. . . . *We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.*" 337 U.S. at 508, 513-14. (Emphasis added.) See also *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

The concluding paragraph of Commissioner Loevinger's dissent to the Commission's assertion of CATV jurisdiction summarizes particularly well the issues involved in this case with respect to the question of the Commission's jurisdictional attempt. Commissioner Loevinger stated, *inter alia*, as follows:

> "However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATVs, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of the Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific Congressional authority." *Notice of Rule Making in Docket Nos. 14895, 15233 and 15971*, 4 Pike & Fischer R.R. 2d at 1724 (1965).

In the present case, the Commission is confronted with a very complex problem concerning the development of a cohesive, visionary and broad range policy on national com-

munications. Yet, the Commission was the first to point out when it embarked on its jurisdictional coup that it lacked the knowledge and experience with respect to CATV to promulgate a decipherable pattern of policy. In fact, this agency, which has been entrusted by Congress with the main responsibility for the husbandry of our nation's communication policy, has many times been found woefully inadequate for the onerous task associated therewith. The late Dean Landis in his Report on the Regulatory Agencies in 1960 stated:

> "The Federal Communications Commission presents a somewhat extraordinary spectacle. Despite considerable technical excellence on the part of its staff, the Commission has drifted, vacillated and stalled in almost every major area. It seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems . . . On major policy matters, the Commission seems incapable of reaching conclusions." Staff of Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect 53 and 54 (Comm. Print 1960).

Amici call these matters to the attention of the Court because they believe that the importance of the issues involved, the Commission's own uncertainty as to its jurisdiction (evidenced by its complete about face from its previous position that it did not have authority to regulate CATV), and its repeated failures to obtain Congressional approval of its assertion of jurisdiction over CATV, makes it imperative that Congress be the one to exercise its will on the complex issues and policy considerations involved. Indeed, the type of policy questions raised by the advent of CATV are, in the view of Amici, the type of questions that can only be completely and finally answered by the representatives of the electorate.

In regard to the Commission's assertion of powers heretofore disclaimed, the Commission (Br. pp. 40-41, ftn. 31) and Midwest Television (Br. p. 31) assert that past disclaimers of authority over CATV do not now preclude the assertion of this authority. In addition, Petitioner Midwest Television (Br. p. 31) also makes the contradictory argument that repeated failures of the Commission to obtain Congressional sanction of its attempts to control CATV warrant the inference that Congress is content to allow the Commission to proceed with its CATV Rules. These two contentions are incredible.

If an agency of *limited and defined powers* may say today that it does not possess a certain power, and tomorrow, say that it has always had this power, totally disregarding its previous conclusions, then there is and can be no such thing as an agency with limited and defined powers. And, if this be so, what purpose can be found in Congress' enacting legislation specifically detailing the powers and the authority of an agency? Congress does not enact legislation without meaning. If the provisions of a Congressional enactment limiting an agency's powers are to have any meaning, then a legitimate interpretation of those provisions by the very agency created thereby, which finds that Congress has not delegated some specific authority, must be given some weight, must affect the course of future action by that agency and color any contrary assertions of authority in the future by that same agency.

D. The Decision in Buckeye Is in Error and Should Not Be Followed by this Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20,274 (D.C. Cir. June 30, 1967) is completely erroneous for the following basic reasons: (1) The case presented only a limited challenge to the Commission's jurisdiction in the posture of an appeal from a cease and desist proceeding; (2)

the Court ignored completely the previous history of regulation by the Commission from its very inception; (3) the Court misconstrued the holding in *Regents v. Carroll;* and (4) the Court in effect based its decision on its view of what the Commission's jurisdiction *should be* under the Communications Act of 1934, rather than on what the jurisdiction *is.*

In *Buckeye,* the District of Columbia Circuit was presented with a limited challenge to the Commission's jurisdiction in an appeal initiated by Buckeye after the Commission had ordered Buckeye, pursuant to Section 312 of the Communications Act of 1934, 47 U.S.C. § 312, to cease and desist from a purported violation of one of the sections of the new CATV rules. The jurisdictional issue was not briefed by Buckeye until after oral argument was heard on its appeal. On the very day Buckeye's supplemetal brief on Jurisdiction was filed, the Commission released the text of its Memorandum Opinion and Order denying the petition of Buckeye and the other petitions for reconsideration of the Second Report and Order. Because Buckeye had not had a full opportunity to call the court's attention to the summary manner in which the Commission refused to reconsider or hear argument on the jurisdictional question, Buckeye moved the District of Columbia Circuit to withdraw the jurisdictional issue, or in the alternative to dismiss its appeal. This motion was denied and the Court insisted on reaching the jurisdictional question in its opinion.

From the above, it is evident that the *Buckeye* Court was presented with only a very limited jurisdictional challenge that did not encompass the full range of Commission CATV rule-making actions, and that did not raise all of the jurisdictional questions which have been presented by Buckeye and other CATV petitioners in the Eighth Circuit case. Because the *Buckeye* decision relfects only a limited presentation of the jurisdictional question, for this reason alone this decision should not control this Court's disposition of the basic jurisdictional question presented for decision herein.

Moreover, in *Buckeye* the Court completely ignored the entire past history of regulation by the Commission, as well as the legislative history of the Communications Act, which reflects that the Commission's exercise of its licensing function is to be limited to those licensees subject to its jurisdiction under Title III. In fact, the *Buckeye* Court, in attempting to find judicial support for its decision, relies solely upon precedents involving licensees. For example, *Carter Mountain Transmission Corp. v. Federal Communications Commission,* 321 F.2d 359, *cert. denied,* 375 U.S. 951 (1963), upheld the imposition, after evidentiary hearing, of a condition on a microwave common carrier. In *Philadelphia Broadcasting Co. v. Federal Communications Commission,* 359 F.2d 282 (D.C. Cir. 1966), the Court did not decide the question of jurisdiction over CATV systems, but only that an agency, *if* it has jurisdiction, may, where alternate methods of regulation are available, make the ultimate determination as to what means or method of regulation are most reasonable. Consequently, the language of *Buckeye* (Slip Op. p. 8) concerning the wide latitude an expert agency possesses in coping with new developments in a dynamic industry is mere dictum insofar as the central question of jurisdiction is concerned.

The Court in the *Buckeye* decision not only ignored the entire history of regulation by the Commission, but also misconstrued the actual holding of *Regents v. Carroll.* The *Buckeye* decision reads in part as follows:

> "In *Carroll,* the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III 'centered' [footnote omitted] around its licensing power, which does not encompass abridgement of contracts between licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at that time to issue cease and desist orders, against licensees or anyone else, to prevent violations

> of the Act. Subsequently, Congress conferred such authority [footnote omitted] which correspondingly expanded the Commission's power to protect the regulatory scheme." Slip Op. p. 7.

This narrow reading of *Regents v. Carroll*, however, completely ignores the language of this Court that the Commission's powers under Title III are clearly limited to its licensing function.

Buckeye also erroneously accepts the underlying basis of the Commission's regulation of CATV, *i.e.*, that "protection" of the television broadcaster is necessary to prevent "unfair competition". The Commission has neither the authority nor the jurisdiction to determine questions of economic competition. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, *cert. denied*, 379 U.S. 989 (1965). Regulation and control to prevent methods of competition fall under the jurisdiction of the Federal Trade Commission, under the Federal Trade Commission Act, as amended, 74 Stat. 200, 15 U.S.C. § 45(a) (1960). The Commission has similar authority nor the expertise to exercise it were the authority present. Moreover, the delegation of enforcement of the CATV rules to the "competitive" industry accomplished by the CATV non-duplication requirements (exercised at the discretion of the television station) is in direct conflict with this Court's decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), where it was emphasized that the Communications Act, unlike many other industry regulatory acts, "recognizes that the field of broadcasting is one of free competition". The protectionist concepts embodied in the Commission's CATV regulatory scheme clearly violate this basic principle.

The *Buckeye* Court was clearly troubled by the Commission's assertion that is entire regulatory scheme would suffer if CATV were to remain unregulated. This Court, in effect, affirmed what the Court thought the Commission's jurisdiction should be. But that is not the point. As discussed in

detail herein, the question is not what a court might believe the jurisdiction of an agency of limited powers should be, but what it *is*.

II

THE COMMISSION LACKS THE STATUTORY POWER TO ISSUE AN INTERIM ORDER MAINTAINING THE STATUS QUO PENDING A HEARING TO DETERMINE THE IMPACT ON LOCAL BROADCAST TELEVISION OF DISTRIBUTION BY A CATV SYSTEM OF TELEVISION SIGNALS FROM OTHER AREAS OF THE COUNTRY.

The Commission's action in issuing a "temporary" stay without a hearing precluding the Respondents from engaging in lawful operations is as equally without foundation, as is its assertion of jurisdiction over non-licensee CATV systems. Once again, the Commission attempts to justify its unauthorized action by claiming to possess broad authority to do all that is necessary to prevent frustration of the purposes of the Act that it administers. However, the Commission is unable to show where in its Act Cognress conferred such authority on the Commission, other than by resort to the borad general language found in Sections 4(i) and 303(r), 47 U.S.C. §§ 154(i), 303(r), which the Commission terms "sweeping grants of authority". (Commission Br. p. 45).

The Commission is not reticent in describing what it has done. It has exercised the injunctive powers of a Court of Equity because it felt that in the circumstances such a course of conduct was preferable. Nor does the Commission, in its judgment, need specific authority to exercise such extraordinary power, denied so often by the Congress to other administrative agencies. Nor do the traditional concepts of judicial judgment and authority in this area prevail. Witness the following assertion: "The agnecy itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule." (Commission Br. p. 53)

This is an extraordinary concept and as well as any other example, properly characterizes the real meaning of the Commission's asserted jurisdiction over CATV. Just as no regulatory agency heretofore has assumed power over an entirely new industry not included in its statutory mandate, it is unheard of for such an agency to vest unto itself the authority to enjoin *legal* activities pending a hearing to determine whether such activities should be permanently strained.[8] Not only is no authority found in the Communications Act for such an extension of judicial powers, but the Commission's action in *Southwestern* is directly contrary to all applicable precedents.

> "Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal Administrative agency can issue such orders, *regardless of the harm which may occur pending its decision or the possible inefficiency of orders it may enter after decision.* (Jaffe, *Judicial Control of Administrative Action,* page 662 (1965)) (Emphasis supplied.)

Congress has expressly delegated to the Commission certain interim redress. (See Section 204 of the Act, 47 U.S.C. § 204 dealing with ninety-day suspension of carrier rates and Section 303(m), 47 U.S.C. § 303(m) allowing suspension of radio operators' licenses after 15 days' notice). Section 312(b), 47 U.S.C. s 312(b) confers general power[9] to issue cease and desist orders *following* an evidentiary hearing in which the burden of proof is on the Commission. These *specific* delegations by the Congress establish the *lack* of the general powers claimed by the Commission.

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[8] See Appendix E of the Brief of Respondent, Southwestern Cable Co., "A Study of Injunctive Powers of Administrative Agencies".

[9] For the legislative history of Section 312(b) and related proposals concerning FCC enforcement of powers, see Appendix D of the Brief of Respondent, Southwestern Cable, Co.

The exercise of power akin to judicial injunctive powers by an agency, absent a direct legislative delegation, has been repeatedly struck down by the Courts, as pointed out by Professor Jaffe. The validity of this principle was described by the District of Columbia Circuit Court in a representative case as follows:

> "The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law. . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. [Citations omitted.] *We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.*" *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875, 880 (D.C. Cir. 1962) [Emphasis supplied.]

The Commission's attempts to distinguish the numerous cases supporting this rule of law are not persuasive. See also *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316 (1961); *Federal Trade Commission v. Dean Foods*, 384 U.S. 597 (1966).

This Court should not allow the Commission to devise its own procedural tools which affect the substantive rights of private citizens when Congress has not only failed to grant such power but by express and specific delegations, *e.g.*, Section 312, denied the Commission the power to act as it has done in this case.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

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